UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

BUDDY STRUCKMAN,
Petitioner,

v.

Case. No 1:20-cv-737

WARDEN, RICHLAND
CORRECTIONAL INSTITUTION,
Respondent.

PETITIONERS TRAVERSE

Buddy Struckman
R.C.I. P.O. Box 8107,
1001 Olivesburg Rd.
Mansfield, Ohio 44905

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Abbreviations Used for Citations to the Record

Abbreviation	Description	Date(s)
Const.	Constitution, Constitutional, Constitutionally, Constitutionality	
Direct appeal	Direct Appeal, Hearing	J: Mar. 31,2020
P-C	Post-Conviction Record, Hearings	A: Feb. 03,2021 B: Mar. 31, 2021 C: Oct. 04,2023, D: Aug. 17,2022
Attach.	Petitioner's Attachments	A, A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, B, C, D, E, F, G, H, J
Petition	Amended Petition for Writ of Habeas Corpus Under § 2254	Feb.22,2024
R.Exh.	Respondent's Exhibit	
T.p.	Transcript page	B1502231, C/15/CRB/10112
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3	Feb. 29, 2016	Metz	None
4	Aug. 17, 2016	Metz	None
5	Sept. 21, 2016	Metz	None
6	Oct. 20, 2016	Metz	None
7	Oct. 28, 2016	Metz	None
8	Oct. 28, 2016	Metz	None
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

BUDDY STRUCKMAN
Petitioner,

vs

WARDEN, RICHLAND CORRECTIONAL INSTITUTION,
Respondent.

Case No. 1:20-cv-737

Black, J.
Litkovitz, M.J.

PETITIONER'S TRAVERSE

Petitioner Buddy Struckman, *pro-se*, makes this Traverse in reply to the Respondent's Return to Order to Show Cause per 28 U.S.C. § 2248 and Habeas Rule 5(e).

Standard for Granting Relief

A federal court may grant habeas relief to this former incarcerated prisoner on this state conviction because this former incarcerated prisoner continues to suffer wrongful conviction collateral legal consequences with the "impact of actuality" citing *Benton v. Maryland*, 395 U.S.784 at 790; *Carafas v. LaVallee*, 391 U.S.234 at 237,238. This Habeas petition may be granted if this petitioner demonstrates that his custody violated the Constitution or law of the United States 28 U.S.C. § 2254(a) or if a state court's ruling on a federal constitutional question "was contrary to, or involved an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."28 U.S.C. § 2254(d)(1) & (2).

Struckman has raised FOUR GROUNDS for relief, all of which may be considered as involving fifteen claims with multiple counts: **GROUND ONE** includes three main claims with multiple counts, claim C-180287 (1)(The judgement was based on insufficient evidence and was

contrary to law) which included counts that he was denied the states requirement of: proof beyond a reasonable doubt, fair trial, plain error, fundamental due process, the Fifth Amendment guarantees the rights to the aforementioned, also insufficient evidence due process, fundamental right, substantive due process equal protections clause, applicable through the Fourteenth Amendment. (2) (Mr. Struckman was deprived of his right to counsel under Sixth Amendment to the United States Constitution when his request for counsel during trial was denied) which included counts that he was denied the states requirement of: due process, fair trial, fundamental error, the Fifth Amendment guarantees the rights to, also plain error, right to counsel, fundamental error, applicable through the Fourteenth Amendment. (3) (The trial court abused Its discretion in finding Mr. Struckman competent to stand trial) which included counts that he was denied the states requirement of: proof beyond reasonable doubt, fair trial, plain error, fundamental due process, the Fifth Amendment guarantees the aforementioned rights. **GROUND TWO** includes one main claim with multiple counts, claim 26(B) which may be considered as comprising one claim: U.S. Constitution Amendment V, fundamental due process, fair presentment. U.S. Constitution Amendment IV, illegal search and seizure, due process. U.S. Constitution VI, right to effective counsel, plain error, fundamental error. (1) (The evidence at trial does not fully support the jury's finding of knowingly to prove guilt.) (2) (Prosecutorial misconduct, cumulative improper inferences not sufficient to prove guilt.) (3) (Violation of Fourth Amendment, Article 1 Section 14 of the Ohio Constitution Unreasonable searches and seizures, court erred in denying motion to suppress.) (4) (Trial Court erred in denying Motion in Limine, denying objections, failed to protect defendant and limit the admissibility of prejudicial evidence, questions and statements.) (b) (Appellant counsel's

fundamental error by refusing to correct errant facts in appellant brief and not attempting to correct prosecutor's errant facts in briefs, citing *McCarthy v. Pollard* 656 F.3d 478.) **GROUND THREE** includes six main claims with multiple counts, claim C-200210 which included counts that he was denied the states requirement of: (1) (U.S. Constitution Amendment V, Requirement of Proof Beyond a Reasonable Doubt, Fair Trial, Plain Error, Fundamental Due Process, Fair Presentment. Ashe V. Swenson 397 u.s. 436. Brady V. Maryland 373 u.s. 83. U.S. Constitution XIV, Due Process, Fundamental Right. Ashe v. Swenson 397 u.s. 436. Brady V. Maryland 373 u.s. 83.) the Fifth Amendment guarantees the rights to the aforementioned, also applicable through the Fourteenth Amendment. Claim C-200216: (1) (Trial court erred in denial of Crim.R.33 Motion which put forth trial courts err in motion Limine, denial of objections by defense, courts failure to protect defendant's Constitutional rights to a fair trial, protect defendant from double jeopardy, prejudicial evidence) which included counts that he was denied the states requirement of: proof beyond reasonable doubt, fair trial, plain error, fundamental due process, fair presentment, *Ashe v. Swenson* 397 U.S. 436. *Brady v. Maryland* 373 U.S. 83. (2) (Prosecutorial misconduct, cumulative improper inferences prejudiced defendant to a fair trial, issues brought in defendants Crim.R.33) the Fifth Amendment guarantees the rights to the aforesaid, also due process, fundamental right, *Ashe v. Swenson* 397 U.S. 436. *Brady v. Maryland* 373 U.S. 83, applicable through the Fourteenth Amendment. Claim C-220658: (1) (Common pleas court unreasonably failed to fully and fairly review the unavoidable-prevention standard in their operative fact finding opportunity under Crim.R.33(B)) which included counts that he was denied the states requirement of: due process, fair trial, double jeopardy, plain error, reasonable doubt, the Fifth Amendment and Fourteenth

Amendment guarantees the rights to the aforementioned. (2) (Common pleas court abused its discretion in denying movants summary judgment and in failing to require respondent show excusable neglect under Civ.R.6(B)) which included counts that he was denied the states requirement of: separation of powers, due process, fair trial, plain error, the Tenth Amendment guarantees the rights to the aforementioned. (3) (Common pleas court adjudication was fundamental error and is contrary to clearly established federal law because it constitutes an unreasonable application in identification of the issues from the acquittal municipal case as it relates to this common pleas case.) which included counts that he was denied the states requirement of: reasonable doubt, fair trial, plain error, due process, double jeopardy, the Fifth Amendment guarantees the rights to the aforementioned, also due process, fundamental right, equal protections, miscarriage of justice, *Giglio v. United States* 405 U.S. 150, applicable through the Fourteenth Amendment. **GROUND FOUR** includes five main claims with multiple counts, claim C-200069 (1) (The courts judgment was the result of un unfair trial.) which included counts that he was denied the states requirement of: proof beyond reasonable doubt, fair trial, plain error, fundamental due process, fair presentment, the Fifth Amendment guarantees the rights to the aforementioned, also plain error, right to counsel, fundamental error, applicable through the Sixth Amendment also due process, fundamental right, applicable through the Fourteenth Amendment. (2) (The ineffective assistance of counsel Craig Newburger resulted in an unfair trial) which included counts that he was denied the states requirement of: proof beyond a reasonable doubt, fair trial, fundamental due process, fair presentment, the Fifth Amendment guarantees the rights to the aforementioned, also plain error, right to counsel advice, fundamental error, failure to advise on *Brady* Material,

the Sixth Amendment guarantees the rights to the aforementioned, also due process, fundamental right, competency, applicable through the Fourteenth Amendment. (3) (The ineffective assistance failure to raise a claim by counsel Bradly Hoyt resulted in an unfair trial.) which included counts that he was denied the states requirement of: illegal search and seizure, due process, the Fourth Amendment guarantees the rights to the aforementioned, also fair trial, plain error, fundamental due process, the Fifth Amendment guarantees the rights to the aforementioned, also plain error, ineffective counsel, fundamental error, the Sixth Amendment guarantees the rights to the aforementioned, also due process, fundamental right, equal protections, applicable through the Fifth Amendment and the Fourteenth Amendment. (4) (The defendant was denied equal protections and due process as guaranteed by the Ohio Constitution and the Constitution of the United States.) which included counts that he was denied the states requirement of: fair trial, plain error, fundamental due process, the Fifth Amendment guarantees the rights to the aforementioned also due process, fundamental right, applicable through the Fourteenth Amendment. Claim C-210640 (1) (U.S. Constitution Amendment V, reasonable doubt, fair trial, plain error, due process, double jeopardy, U.S. Constitution Amendment XIV, due process, fundamental right, equal protections, miscarriage of justice, Brady v. Maryland 373 u.s.83.), which included counts that he was denied the states requirement of the said applicable rights through the Fifth and Fourteenth Amendments. Claim C-210640 motion 60(B)(5) reason justifying relief from judgment: which included counts that he was denied the states requirement of: reasonable doubt, fair trial, plain error, due process, double jeopardy, the Fifth Amendment guarantees the rights to the aforementioned, also due process, fundamental right, equal protections, miscarriage of justice, *Brady v. Maryland*, 373

U.S. 83 violation pursuant to *Giglio v. United States* 405 U.S. 150 applicable through the Fourteenth Amendment.

Procedural Default Issues

Argument

The state courts made an objectively unreasonable determination of the facts and denied relief by finding that jurisdiction was at issue in **GROUND TWO** claim 26(B), all of **GROUND THREE** claims and **GROUND FOUR** claim C-210640. Petitioner is mindful the default doctrine has a few, very narrow exceptions. The petitioner can demonstrate "cause and prejudice" opposed to default, as well as the petitioner states a compelling argument that a "miscarriage of justice" will occur if petitioners claim is not heard on the merits and so this petition may still be given consideration by this Federal Court. Cause for default in an external circumstance which clearly affected the petitioner from presenting timely filings in the claims in **GROUND THREE** claim C-200210, and claim C-200216 in state court was Covid-19 emergency lockdowns, in other words it was not prisoner Struckman's fault, and there was no way Struckman being held as a prisoner could have prevented it. March 9, 2020, the Governor of Ohio issued executive order 2020-01D and declared a state of emergency in Ohio to Covid-19, see attach. A-3. The O.D.R.C. quarantines were in effect until September 27, 2020 from which afterwards the O.D.R.C. continued to monitor recreation and stagger the schedule, see attach. A-2. Covid-19 is not an insufficient excuse but rather a prime case in point of good cause which functionally incapacitated prisoner Struckman to perform timely filing duties. Even then, prisoner Struckman diligently raised his claims immediately once the impediment had been removed even as the impediment continued staggering the schedule. The state court has failed to regard

this prisoner's inability to e-file or the delay of local mail delivery services caused by Covid-19 state of emergency. The state courts should have anticipated and expected the courts hearing and consideration of Struckmans filings necessitated by the Covid-19 emergency because his filings explicitly states delay from the cause of the Covid-19 emergency. The state court should have granted Struckmans request because it was a reasonable request necessitated by the COVID-19 emergency effects or measures. No other ordinary, everyday physical restriction imposed is likened by Struckman's confinement during Covid-19 pandemic, no failure to raise time obstacle can rise to compare to the level of "cause" as does prisoner confinement during Covid-19 pandemic. Struckman has experienced "prejudice" in the context meaning that the state courts errors denying jurisdiction motivating the Const. claims resulting in him being denied "full and fair" merit review and "worked to his actual and substantial disadvantage, infecting the proceedings with error of Const. dimensions." pursuant to *U.S. v. Frady*, 456 U.S. 152, 170.

Cause to overcome the state procedural default contention in **GROUND TWO** claim 26(B) is put forward by request to this court to analyze attach. A-7 docket summary which does not reflect petitioner was given a notice of an appealable order, rendering timely 26(B) appeal meaningless which is a denial of the right to legal redress which petitioner was not given. "For due process purposes litigants are entitled to reasonable notice of the trial courts appealable orders" pursuant to *State ex rel. Sautter v. Grey*, 117 Ohio St. 3d 465 at (**p9) HN1. *Moldovan v. Cuyahoga County Welfare Dep't*, 25 Ohio St.3d 293 at HN2 makes clear petitioner "shall have remedy by due course of law" and shall have justice administered without denial or delay. Citing *Moldovan v. Cuyahoga County Welfare Dep't*, 25 Ohio St.3d 293 at (*296) HN3, HN5 "in

the interest of justice and fairness, Ohio should have a rule similar to Fed.R.Civ.P.77(d) to prevent the kind of situation illustrated by the case at bar making clear that failure to give reasonable notice of a final appealable order is denial of ** Section 16 Article 1 of the Ohio Const.. Citing *Pickett v. City of Cleveland*, 2020 U.S. Dist.Lexis 259242 at (*21) due course of law clause in Ohio Const. is equivalent to the due process clause of the U.S. Const.. Procedural due-process challenge concerns the adequacy of the procedures employed in a government action that deprives a person of life, liberty or property and the fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner pursuant to *Ferguson v. State* 151 Ohio St.3d 265 at HN13, HN14. The state is in violation of Const. XIV due process pursuant to *State v. Jackson* 1995 Ohio App. Lexis 2608 at (*p5) because the clerk failed to serve final orders as required under *Atkinson v. Grumman*, 37 Ohio St. 3d 80, 523 N.E. 2d 851 at HN13 whereas due process protects those fundamental principles. Furthermore, filing a mandamus may likely produce the jurisdictional documents creating an opportunity for additional legal redress, however in fact attach. A-1 S.Ct. 26(B) leave denial shows the state received the required documents and petitioner completed a reasonable attempt to file the 26(B) in proper form after a third party attained and conveyed the jurisdictional documents. Leave to file was denied by the state while informing petitioner in attach. A-1 that Rule 7.01(A)(4)(c) prohibits delayed appeal pursuant to App.R.26(B). Therefore, mandamus filings would be meaningless. The prior records of prison mail may serve as proof petitioner presented his documents to prison officials "in sufficient time for them to arrive timely in the normal course of events" *Maples v. Stegall* 340 F.3d 433 at 439 and as such, his procedural default may be excused pursuant to *Hearn v. Warden* 2023 U.S. Dist. Lexis 164030 at (*p28), nonetheless

Petitioners attach. A-1 is ample to show proof of service, therefore, although exploration of O.D.R.C postage records may show proof of service they are not necessary. Therefore, attach. A-1 shows Petitioner has not procedurally defaulted **GROUND TWO** claim 26(B) pursuant to *O'Sullivan v. Boerckel*, 526 U.S. 838, 845,119 S.Ct. 1728, 144 L.Ed.2d 1. Petitioner also incorporates parts of the aforesaid argument to expound default exception to the **GROUND THREE** claim C-200216 because the state courts have shown accountability in how they have routinely failed to properly service final appealable orders, see *State v. Struckman* 2021-Ohio-1043, attach. B at [*p6], In a practical sense, read the aforesaid collectively as "fundamental procedural due process errors," which mandates jurisdiction to review the merit pursuant to *Coleman v. Thompson*, 111 S.Ct. 2546,2557; *Chapman v. California*, 386 U.S. 18.

Furthermore, Federal courts are disposed to consider habeas petitions as "law and justice" require under 28 U.S.C. § 2243. Petitioner cites case law on equitable principles applied to 2254, pursuant to *Holland v. Florida*, 130 S.Ct. 2549, 2560, 2561 (equitable principles have traditionally governed the substantive law of habeas corpus); *Munaf v. Geren*, 553 U.S. 674,693 (Habeas corpus is governed by equitable principles); *Fay v. Noia*, 372 U.S. 391,438; *Danforth v. Minnesota*, 552 U.S. 264,278. Petitioner requests equitable principles be applied to this petition allowing a "full and fair" review of the disregarded and omitted evidence merit. The state of ohio makes their motive obvious with direct attempt to "cover up" the said evidence which proves their willful failure to act and their unlawful deprivations of civil liberties against Struckman through their undermining the procedural default methodology, endeavoring to disregard and omit material facts proving reasonable doubt and actual innocence out of the record. The state court is contrary to their own state law pursuant to *State v. Nayar,* 2007-Ohio-

6092 at [*p28] [HN10] whereas "our reasoning has been that it is preferable to hear cases on their merits rather than to dismiss them for minor technicalities"; *State v. Adams* 1998 Ohio App. Lexis 3509 whereas cases should be decided on their merits rather than procedural technicalities. Furthermore, petitioner recognizes that the standard of review for all 2254 petitions requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has from a broad writing prospective, kept the U.S. Const. errors the focus of the argument. By way of how the claims are formulated the state is aware that "it is not necessary to invoke" the talismanic phrase' or cite book and verse pursuant to *Tamapua v. Shimoda*, 796 F.2d 261, 262-263 *Id..*; also *McIntosh v. Hudson*, 632 F.Supp.2d 725; *Duncan v. Henry*, 513 U.S. 364 "it is not necessary to invoke" the talismanic phrase' or cite book and verse; *Demastery v. Warden* 2007 U.S. Dist. Lexis 119110. To the extent that Grounds were unartfully drafted, the "basic rationale" is "readily discernible," and as a *pro se* petitioner, Struckman requests the Petition be liberally construed pursuant to *Perruquet v. Briley*, 390 F.3d 505, 512. The Const. Grounds for relief have been more concisely worded in the Traverse. Struckman has not procedurally defaulted pursuant to *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1. Petitioner cites "actual innocence" citing *Schlup v. Delo* 513 U.S. 298, 327-329; *Herrera v. Collins* 506 U.S. 390; and "miscarriage of justice" citing *Wainwright v. Sykes* 433 U.S. 72, 87-88 (1977); *Murray v. Carrier*, 477 U.S. 478, 495-496; *Edwards v. Carpenter*, 529 U.S. 446, 451, requesting this court impartially hear Struckmans claims in a "full and fair" merit review.

In addition to the aforementioned cause and prejudice the state appeal courts recorded entry in attach. B determination as to the **GROUND THREE:** C-200210 determination unreasonably dismissed the appeal deeming "no appeals court jurisdiction". See *State v.*

Struckman 2021-Ohio-1043, attach. B at {¶4-6}. The said determination conscripted App.R.3(A) and (4) and then cited *State ex rel. Curran v. Brookes*, 142 Ohio St. 107, 50 N.E.2d 995, paragraph seven of the syllabus. The state appeal court unreasonably failed to consider their own error which prejudiced petitioner by preventing him from timely filing appeals, See *State v. Struckman* 2021-Ohio-1043 attach. B at [*p6] whereas the state appeals court asserts "neither the judgment overruling the post-conviction relief nor the judgment overruling the new trial motion has been served on Struckman". The said C-200210 judgment entry which was required to be timely served pursuant to Civ.R.58(B) in order for Struckman to timely file the state appeals had never been timely served upon Struckman. The state courts failed to service the said required judgments, therefore for the state courts unreasonable determination, petitioner retains the ability to state **GROUND THREE:** C-200210 counts for an "unreasonable determination of the facts." citing *Badelle v. Correll*, 452 F.3d 648, 654-655. A petitioner qualifies for habeas relief if the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1); *Charlton v. Davis*, 439 F.3d 369,374.

In **GROUND THREE** claim C-220658 the unavoidable-prevention standard under Crim.R.33 required the state court to determine whether leave to file a new trial motion was warranted. The state courts prejudice is noticeable when evaluating the circumstances and the first issue presented for the **GROUND THREE** claim C-220658 whereas the first district court of appeals attach. C determination unreasonably determined that "regardless" despite the consequences they presume Struckman "failed to demonstrate that he was unavoidably prevented from timely filing a new-trial motion". The following puts forth that attach. J "exhibit J" with relevant

vital attachments in **GROUND THREE** determination C-220658 was not given an impartial "full and fair" unavoidable-prevention assessment. Examine *State v. Struckman* 2023-Ohio-3582, attach. C at {¶9-11}. The court opined in the state appeal court's aforesaid determination that *Struckman I* opinion attach. J "exhibit J" "was not available before or at his felony trial or within the 120 days from the guilty verdict". With fair analysis the aforesaid record in the determination by the state appeal court confirms "*Struckman I*" attach. J "exhibit J" could not have been previously discovered through the exercise of due diligence before or at the felony trial in 2018. Moreover, Struckman has made clear to the state courts it was "impossible to determine" the grounds why the jury convicted and Struckman had no way to know the "basis" grounds for the general verdict pursuant to *Doherty v. American Motors Corp* 728 F.2d 334 at (**30). It is "impossible to say" "basis for the verdict" "impossible to determine" citing *Bachellar v. Maryland* 397 U.S.564 at Led HN4. It is "not easy to determine basis for the verdict" citing *State v. Smallwood,* 1979 Ohio App. Lexis 11820 at (*10). "*Struckman I*" attach. J "exhibit J" is where applicant shows pursuant to "2254(e)(2) (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence". A "factual predicate of * habeas claim is the state courts journal entry" pursuant to *Aquila v. Eppinger* 2019 U.S. Dist. Lexis 142066 at (*12), and (*14). Additionally, the vital "factual predicate became known when * 'received the journal entry'" pursuant to *Hackett v. Bradshaw* 2012 U.S. Dist. Lexis 184587 at (*20). The "necessary factual predicate for * habeas ground for relief would be the court of appeals denial" pursuant to *Floyd v. Forshey* 2023 U.S. Dist. Lexis 113411 at (*23). Pursuant to *Crangle v. Kelly* 838 F.3d 673 at (***11) and (*681) "the order is a factual predicate" and *Johnson v. United States* 544 U.S. 295 interpretation of 2244(d)(1)(D) established that a state-

court decision can qualify as a fact. Pursuant to *Crangle v. Kelly* 838 F.3d 673 at (**19) through (**22) "bringing the proceedings petitioner causes the factual predicate event to occur, any court order a petitioner generates may potentially qualify, "state-court decision can qualify as a fact", must account for "reality of the prison system" and be careful to avoid imposing an unreasonable burden on prisoners". However, despite the consequences the state appeal court opined in attach. C determination C-220658 that (*Struckman I*) attach. J "exhibit J" "is not new evidence" which is unreasonable because the fact is that attach. C at {¶9-11} itself is internally consistent evidence with support to prove unavailability of the facts or grounds before or at Struckmans 2018 felony trial or within the 120 days from the guilty verdict thereby showing Struckman was unaware due to the unavailability. The state appeal court is bound by (*Struckman I*) "exhibit J" attach. J judgment as being newly available tangible physical evidence Struckman presented, "proving a material fact" because attach. J "exhibit J" (*Struckman I*) "judgment is evidence" of its rendition pursuant to *Hanson v. Lessee of Eustace* 43 U.S. 653 at (***79); also "judgment is evidence" pursuant to *Badgely v. Badgely* 1877 Ohio Misc. Lexis 34 at Headnotes/Summary. The state collectively has ignored the tortured procedural and factual history that has brought us to this point, the state curtailing Struckmans pursuit of truth infringes upon the U.S. Const. integrity and pursuit in justice. Furthermore, the state appeals courts 2023 determination C-220658 in attach. C at {¶9-11} is a conflicting determination of attach. J "exhibit J" by denying jurisdiction and only unclearly assumes an allegation of Struckmans awareness of facts and grounds in attach. J "exhibit J", the state appeal court has made an "unreasonable determination of the facts" citing *Badelle v. Correll*, 452 F.3d 648, 654-655 *Id.*. The state court has failed to justifiably offer any clarification or explanation with facts

or conclusions of law in their 2023 determination C-220658 attach. C concerning exactly how the state appeals court is able to prove beyond speculation the states allegation of Struckmans alleged perception at the 2018 trial or within the 120 days after the 2018 trial or explain how Struckmans alleged perception would include competent actual awareness of the identical set of facts or grounds produced in the 2020 determination C-180287 attach. J "exhibit J". The state appeal court has unreasonably failed to determine exactly how Struckman was aware of the unavailable grounds at the 2018 trial or within the 120-day time period after the 2018 trial. Furthermore, the state appeal court has unreasonably failed to determine in what manner their speculated projection of Struckman's "awareness of the grounds" has in the least likeness with Struckman having available physical tangible evidence attach. J "exhibit J" giving the availability to actually present a factual predicate in a U.S. Const. claim and tangibly "proves the grounds" to the state courts. The state appeal court determination C-220658 awkwardly cites *State v. Risden* 2d Dist. Montgomery No. 25234, 2013-Ohio-1823, attach. C at ¶13 which does not in the slightest way reasonably clarify or justify the states biased rejection of attach. J "exhibit J" grounds as being tangible, available, and discernable "new evidence" which should have allowed merit review of all pertinent attached evidence, attach. F, attach. H. Petitioner retains the ability to state **GROUND THREE:** claim C-220658 for an "unreasonable determination of the facts" citing *Badelle v. Correll*, 452 F.3d 648, 654-655. Furthermore, a petitioner qualifies for habeas relief if the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C.§2254(d)(1); citing *Charlton v. Davis*, 439 F.3d 369,374. "State courts have had an opportunity to correct the constitutional violation in the first instance" citing *O'Sullivan v. Boerckel*, 526 U.S. 838 *Id.*.

In **GROUND FOUR** claim C-210640 the unavoidable-prevention standard under R.C.2953.23(A)(1)(a) required the state court to determine whether leave to file a new trial motion was warranted. "State courts have had an opportunity to correct the constitutional violation in the first instance" citing *O'sullivan v. Boerckel*, 526 U.S. 838 at 1, *Id.*. The state appeals courts determination is unreasonable because they did not "fully and fairly" review all the evidence, see determination C-210640 *State v. Struckman* 2022-Ohio-2848, attach. D at {¶8} which the state appeal court asserts "All the evidence which Struckman submits in support of his postconviction claims was either known or made known to him at the time of his trial". That said state appeal court determination C-210640 in the aforesaid judgment is "objectively unreasonable" and contrary to the determination C-220658 *State v. Struckman* 2023-Ohio-3582, attach. C at {¶9-11} whereas the state appeals court affirmed that the evidence *Struckman I* attach. J "which is exhibit J" was not available before or at his felony trial or within the 120 days from the guilty verdict. By the said state appeal court determination of facts in C-220658 "attach. C" at {¶9-11} the state appeal courts prior determination C-210640 "attach. D" at {¶8} has been undermined because determination C-210640 has been overcome by determination C-220658 "attach. C" at {¶9-11} proving unawareness of facts and grounds in attach. J "exhibit J" evidence by the state appeals courts admission in their statement about the unavailability of attach. J "exhibit J" evidence before or at his 2018 felony trial or within the 120 days from the guilty verdict. Struckman expounds details how the unavoidably-prevented standard proving the unawareness hurdle was cleared by making clear in corresponding C-220658 proceedings it was "impossible to determine" the grounds why the 2018 trial jury convicted and Struckman had no way to know the "basis" grounds for the general verdict

pursuant to *Doherty v. American Motors Corp*, 728 F.2d 334 at (**30). It is "impossible to say" "basis for the verdict" "impossible to determine" pursuant to *Bachellar v. Maryland* 397 U.S. 564 *Id.* at Led HN4. It is "not easy to determine basis for the verdict" pursuant to *State v. Smallwood,* 1979 Ohio App. Lexis 11820 *Id.* at p*10. The state appeal courts determination in C-210640 most certainly overlooked attach. J "exhibit J" materiality as a vital factual predicate and unreasonably failed to consider all the facts with attach. J "exhibit J" evidence in "full and fair" state court proceedings. The attach. G at T.p.89-516 shows the state trial court made the prior municipal case res-judicata issues "moot" and shows the state courts in plain error failed a full and fair review of the prior res-judicata issues which is contrary to federal law. The state appeal court determination that attach. J, attach. F, and attach. H is not unavoidably-prevented evidence is "clearly erroneous," allowing Struckman to retain the ability to state a claim for habeas relief for the state appeal courts "unreasonable determination of the facts" citing *Badelle v. Correll*, 452 F.3d 648, *Id.*; 28 U.S.C. § 2254(d)(1); *Charlton v. Davis*, 439 F.3d 369 *Id.*. The C-210640 attached evidence "collectively" as a whole proves actual innocence, citing *Schlup v. Delo* 513 U.S. 298, 327-329; *Herrera v. Collins* 506 U.S. 390; and "miscarriage of justice" citing *Wainwright v. Sykes* 433 U.S. 72, 87-88; *Murray v. Carrier*, 477 U.S. 478, 495-496; *Edwards v. Carpenter*, 529 U.S. 446, 451. "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged" citing *Sanders v. United States* 373 U.S. 1 at p.8, p.1073. In **GROUND THREE** claim C-220658 as well as **GROUND FOUR** claim C-210640 the 2018 trial had multiple theories of guilt which was speculated from circumstantial evidence, therefore assuming Struckman was aware of the unavailable general verdicts vital underlying grounds found in the un-admitted attach. J evidence without a hearing was improper and caused oversight of the Const. plain error at trial "mooting the issues" from nexus trial exhibit PG. The state has failed to confirm Struckmans awareness of unavailable vital facts.

In all of **GROUND THREE** claims as well as **GROUND FOUR** claims the state jurisdictional bar is not independent of federal law and failed to determine whether federal const. error such as const. plain trial error and/or *Brady Giglio* error has been committed citing *Were v. Bobby*, 2024 U.S. Dist. Lexis 25782 *Id.*

In addition to the aforementioned cause and prejudice to a fair trial Struckman's evidence and arguments also demonstrates "actual innocence" with reasonable doubt in **GROUND ONE**. Struckman's state court appointed appellate counsel omitted facts and disregarded "actual innocence" evidence in **GROUND TWO** claim 26(B), and in addition to all important disregarded "actual innocence" facts in **GROUND THREE** claims as well as **GROUND FOUR** claim C-210640, the disregarded and omitted evidence overwhelming proves that, without a doubt, someone else committed the crime for which Struckman was convicted. Petitioner cites "actual innocence" with **ALL GROUNDS** pursuant to *Schlup v. Delo* 513 U.S. 298, 327-329*; Herrera v. Collins* 506 U.S. 390*;* and "miscarriage of justice" pursuant to *Wainwright v. Sykes* 433 U.S. 72, 87-88; *Murray v. Carrier*, 477 U.S. 478, 495-496; *Edwards v. Carpenter*, 529 U.S. 446, 451. Actual innocence meaning that "no reasonable juror" –none-- would have found Sruckman guilty if not for the constitutional error complained of in the petition claims. Struckman's factual innocence evidence exceptionally clears the hurdle in proving reasonable doubt and actual innocence exist, Struckman activates this exception by offering the indisputable attach. F:C/15/CRB/10112 acquittal transcripts "and attach. H: assault incident number 2016000004390, evidence which exculpates Struckman and inculpates someone else other than Struckman as having dominion and control over the property.

Grounds for Relief

GROUND ONE: (1) The Judgment was based on insufficient evidence and was contrary to law. (2) Mr. Struckman was deprived of his right to counsel under Sixth Amendment to the United States Constitution when his request for counsel during trial was denied. (3) The trial court abused its discretion in finding Mr. Struckman competent to stand trial.

Argument

(1) The Judgment was based on insufficient evidence and was contrary to law. Struckman claims the state trial court judgment was based on insufficient evidence which violates due process Fourteenth Amendment U.S. Constitution citing *Jackson v. Virginia* 443 U.S. 307, 99, S.Ct. 2781, 61 L.Ed 2d.560 (1939) and the state court determination was contrary to law in failing to consider *State v. Jordan* 2000-Ohio-225 at [***17] (Emphasis added). Essentially, the state appeal court denied consideration of the question of the threshold level of knowledge necessary to find a violation of R.C.2923.17(A); pursuant to *State v. Jordan* 2000-Ohio-225 *Id.* at [***19] in determining whether a defendant "knowingly" possessed a dangerous ordnance, we construe R.C.2923.17(A) pursuant to *State v. Jordan* 2000-Ohio-225 *Id.* at [*495] as requiring that the state must prove that a defendant know or be aware of the probability that the item in his possession is dangerous. The state's evidence has violated due process U.S. Const. Amend. V, XIV because it is insufficient materially to prove beyond a reasonable doubt Struckman had conscious of a locked safe that contained the dangerous ordnance, pursuant to *State v. Jordan* 2000-Ohio-225 *Id.* and *State v. Hankerson* 70 Ohio St. 2d 87 whereas conscious "must be shown". Moreover, there is insufficient materiality to prove Struckman had access to open the locked safe, or to meet the sufficiency of materiality requirement in *State v. Jordan* 2000-Ohio-225 *Id.* that the "state must prove" that Struckman was conscious the item inside the locked safe was dangerous. The state failed to show a closer connection of materiality between the offender and the gun "at some point". The state appeals court has unreasonably overruled the errors and affirmed the judgment.

> See (attachment J) First Appellate District OPINION C-180287: *State v Struckman* 2020 Ohio app. Lexis 1187 at {¶17} "the state presented circumstantial evidence showing that Struckman was the only person who had dominion and control over the area where the dangerous ordnances were found and that he would have been conscious of their presence". See State v. *Finnell*, 1st Dist. Hamilton Nos. C-140547 and C-140548, 2015-Ohio-4842, ¶ 41-45; State v. *Brown*, 1st Dist. Hamilton No. C-120327,2013-Ohio-2720, ¶ 43; *English*, 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759, at ¶ 28-29; *State v. Bailey*, 1st Dist. Hamilton Nos. C-060089 and C-060091, 2007-Ohio-2014, ¶ 35-40. The state also presented circumstantial evidence to show that Struckman had an automatic firearm and a suppressor under his control while committing the offenses.

The aforementioned cases the state appeals court has cited in their determination C-180287 (attachment J) are very dissimilar to Struckmans case. In *State v. Finnell* 2015-Ohio-4842 *Id.* at [*p8], [*p12] an accomplice made statements against *Finnell* in turn *Finnell* made threats to the accomplice, then in *State v. Finnell* 2015-Ohio-4842 at [*p13] phone conversations led police to search to find a firearm which *State v. Finnell* 2015-Ohio-4842 *Id.* at [*p15] ultimately admitted to owning in a jailhouse phone call. *Finnells* admission shows actual possession "at some point". In *State v. Brown* 2013-Ohio-2720 *Id.* at [*p2] a witness seen *Brown* with a firearm and heard gunshots. *State v. Brown* 2013-Ohio-2720 *Id.* at [*p3] residents admitted police to search and *State v. Brown* 2013-Ohio-2720 *Id.* at [*p4] *Brown* was found in a bedroom where police also found a warm loaded handgun, also shell casings were found at the home *State v. Brown* 2013-Ohio-2720 *Id.* at [*p5] where police also found a .38 caliber firearm *State v. Brown* 2013-Ohio-

2720 *Id.* at [*p6] with *Brown's* DNA on the firearm, *State v. Brown* 2013-Ohio-2720 *Id.* at [*p6] along with *Brown's* documents at the home. *State v. Brown* 2013-Ohio-2720 *Id.* at [*p6] *Brown* tested positive for Gun Shot Residue on both *Brown* hands. *Browns* DNA shows actual possession "at some point". In *State v. English* 2010-Ohio-1759 *Id.* at [*p1] an anticipatory warrant was served, *State v. English* 2010-Ohio-1759 *Id.* at [*p1] personal belongings in the residence, *State v. English* 2010-Ohio-1759 *Id.* at [*p1] fingerprints found on the shotgun found in the kitchen showed *English* handled the firearm and showed actual possession "at some point". In *State v. Bailey* 2007-Ohio-2014 *Id.* at [*p6] a witness identified *Bailey* as the shooter, and identified the *Bailey* name, *State v. Bailey* 2007-Ohio-2014 *Id.* at [*p11] *Bailey* was in the apartment where the gun was found and *State v. Bailey* 2007-Ohio-2014 *Id.* at [*p12] *Bailey* tested positive for Gun Shot Residue. *Bailey* testing positive for Gun Shot Residue along with proximity shows actual possession "at some point". Struckman's case is distinguishable from the aforementioned cases. Determination in attachment B at [*p34] *State v. Struckman* 2021-Ohio-1043 confirms "no gunshot residue was located or the results came back negative with regard to Mr. Struckman". Struckman overcame the states objection to this line of questioning by asserting that it was relevant, and thus admissible, to show that he had not constructively possessed the weapons found in the residence. Furthermore, see attach. G at T.p.1157 where states witness officer jones testified no items on second floor bear the defendants name, also see attach. G at T.p.513,515 whereas the state trial court itself describes the building as "disheveled" and "tends to establish you were not living there". Furthermore, see attach. J at {¶20} also see T.p Index 4-27-18 T.p at 30-31,33 where testimony showed Struckman had temporarily stayed at Mr. Sears address not at the address where dangerous ordnances were

found. Furthermore, see attachment G at T.p.592 where Struckman's residential address was listed on his valid driver's license as Gainesville Florida. In addition, see attachment G at T.p.1141 indications of a non-habitable building include "plywood doors" cover the doors because the doors did not have keys or locks, defendant also prompted the state courts to collectively pay attention to lack of signs of "basic life" because one needs basic necessities in a home to live in it see attachment G at T.p.1111, and the added fact that "no electric bills" "cannot confirm power" see attach. G at T.p.642. The said evidence in the record tends to show the house was not inhabited by Struckman and it was not secure against intruders. The fact finders have made an "unreasonable determination" in failing to notice attachment G at T.p.36, 42, 934-935 where a squatter that ran from the house was found nearby and an additional firearm was found, the said circumstance is indicative of the squatter's consciousness of the contraband inside the house due to the squatter's flight from the residence pursuant to *Drake v. Superintendent, Trumbull Correctional Inst.*, 1997 U.S. App. Lexis 781 at HN15. The states presumption of Struckmans guilt in this case is prejudicially speculated from circumstantial evidence and is undisciplined, the state appeal court determination is "contrary to law" and has allowed preferential inference-stacking from state prosecutions deceptive practice omitting facts from evidence and using errant facts as a means to uphold this conviction contrary to fair trial requirements in *State v. Bernard* 2018-Ohio-351 at HN7. Moreover, the state trial record cannot sufficiently prove Struckman had conscious of a locked safe that contained the dangerous ordnances, the state cannot prove Struckman had access to open the locked safe and the state cannot prove that Struckman was conscious the items inside the locked safe was dangerous. In fact, the state has collectively committed "egregious misconduct" in their

practice omitting facts and using loathsome speculations in claiming that no one other than Struckman was using the house. Furthermore, the state appeal court is contrary to law pursuant to *State v. Jordan* 2000-Ohio-225 *Id.* at HN19 which shares the concern of the United States Supreme Court in *Staples* of "criminalizing a broad range of apparently innocent conduct" citing *Staples v. United States*, 511 U.S. 600 at 610, 114 S.Ct. at 1799, 128 L. Ed 2d at 619, quoting *Liparota v. United States* 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434, 440., "In those situations where a defendant, in good faith, has no way of determining that the item in his possession is dangerous ***, he or she should not be subject to prosecution under O.R.C.2923.17(A). What is more is a U.S. Const. plain trial error which occurred during the state trial courts presentation in the instructions which neglected the scienter element or an advanced knowledge element which is "pertinent" and "relevant for the threshold juncture "moment of truth" and an essential requirement to sufficiently prove the firearm specification 2941.144. "Habeas corpus relief is available in cases of plain trial error citing *Krzeminski v. Perini*, 614 F.2d 121 at HN1, "where there is plain error in the record which is reviewable under state law, we can review it in a habeas proceeding, the Ohio courts review plain error in jury instructions accordingly we can do the same pursuant to *Hockenbury v. Sowders* 633 F.2d 443 at [*446]. The 2018 trial court jury instructions failed to achieve materiality that distinguishes "actual possession" "at some point", that taken as a whole made the instructions "clearly deficient", and produced a grave miscarriage of Const. Amend. V, XIV due process, fair trial, and resulted in the "basis" grounds of the jury verdict being excessively speculative and making the grounds uncertain and "conclusory". Conclusory grounds in the 2018 trial court jury's firearm specification verdict is an equivalent in the same as insufficient

evidence in the jury's firearm specification verdict which affects the integrity and fairness in the state trial courts ability to fairly apply the firearm specifications R.C. 2941.144 because the verdict result lacks Const. XIV sufficiency in having an exact, accurate, correct and precise determination. Therefore, the said firearm specifications 2941.144 could not apply without proving the essential material element of actual possession "at some point". The Const. XIV deficiency in sufficiently proving the said essential element has caused the grounds from the 2018 general verdict in deliberations to be vague. Clearly state witness officer jones testimony alone stating that "this weapon we do not" "I do not personally believe it to be used in the offence" see attachment G at T.p.672, is ample testimonial evidence for Struckman to be successful on a Rule 29 motion for an acquittal on April. 27, 2018 at T.p. 16-24, thus the state trial court should not have instructed a jury on a charge that is not supported by sufficient evidence pursuant to *Rodriguez v. McMullen* 2023 U.S. App. Lexis 8643 HN3. The said plain trial error is reviewable even absent an objection, "thus not precluded from reviewing in habeas corpus proceeding *Hockenbury v. Sowders* 633 F.2d 443 at (**7) citing *Cook v. BordenKircher,* 602 F.2d 117 at 119. If a plain error affects the integrity, fairness, or public reputation of judicial proceedings, it is in the discretion of the court to correct the error pursuant to *Untied States v. Dazey*, 403 F.3d 1147 at [**69]. When a constitutional error is at issue, the burden is on the government to establish beyond a reasonable doubt that any error did not contribute to the verdict pursuant to *United States v. Voda* 2004 CCA Lexis 29 at [*8]. The state prosecution speculated constructive possession theory as no more than one of the possible theoretic basis for not only the dangerous ordnance convictions, but also the finding for the firearm specification 2941.144, see attachment G at T.p.1262, 1334, 1348. In state appeal court

Struckman argued that the elements "conveniently accessible" and "within immediate physical reach" are equated with "ready at hand" and the 2018 trial court jury instruction argument in state appeal court highlights the lack of Const. XIV sufficiency of evidence to prove the "ready at hand" element and the state appeal court has never performed a constitutional plain error analysis. A constitutional plain error is reviewable, even absent an objection and a "full and fair" analysis further demonstrates a defective 2018 trial court reasonable doubt instruction as part of cause and prejudice pursuant to *Monk v. Zalez* 901 F.2d 885 at [*890] showing the state trial court committed constitutional plain trial error because the state trial court jury instructions "willingness to act" language petitioner identifies has been repeatedly criticized by federal courts, as the D.C. circuit has noted "there is a substantial difference between a jurors verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him." The judges charge on this point "should have been in terms of the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act." see *Holland v. United States*, 348 U.S. 121 at 140. Citing *Cupp v. Naughten*, 414 U.S. 141 at (****13) which holds that the conviction violates due process because the language is constitutionally defective and it "so infected" the jury with an unreliable vehicle for determining firearm specifications R.C. 2941.144 guilt or innocence beyond a reasonable doubt. U.S. Const. due process requires the state prove beyond a reasonable doubt pursuant to *Patterson v. New York*, 432 U.S. 197 at [*210]. The states burden is to "prove every element of an offense beyond a reasonable doubt" pursuant to *Sandstrom v. Montana*, 442 U.S. 510,524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); citing U.S. Const. V, XIV. Furthermore, "In order to satisfy its burden of proving that a Const. error is harmless, the state government must prove beyond a

reasonable doubt that the defendant would have been convicted of the firearm specifications 2941.144 absent the violation" citing *U.S. ex. Rel. Miller v. Greer*, 772 F.2d 293, 297. Harmlessness is a question of federal law, and not of fact. *U.S. ex. Rel. Savory v. Lane,* 832 F.2d 1011, 1018. "Therefore, although the Federal court must presume that subsidiary findings of facts by the state courts are correct, see 28 U.S.C. § 2254(d) the ultimate determination of whether the existence of constitutional error mandates a new trial requires a *de novo* determination by the federal court" citing *U.S. ex. Rel. Miller v. Greer,* 772 F.2d 293 at HN3. In addition, the reasonable doubt instruction was also defectively presented to the 2018 trial jury to be considered by reference to the term "moral"' rather than evidentiary certainty, a reasonable juror taking the charges as a whole, could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Const. due process clause pursuant to *Cage v. Louisiana* 498 U.S. 39 at syllabus. In view of the central role that the said instruction plays in the administration of criminal justice, courts must carefully guard against deviation of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt pursuant to *Smith v. BordenKircher*, 718 F.2d 1273 at 1276 quoting *Estelle v. Williams* 425 U.S. 501, 503, 48 L.Ed. 2d 126, 96 S.Ct. 1691. "When Constitutional error is at issue, the burden is on the state government to establish beyond a reasonable doubt that any error did not contribute to the verdict pursuant to *United States v. Voda* 2004 CCA Lexis 29 at [*8]. Furthermore, because the state law clearly formulates constructive possession alone cannot support the firearm specification finding unless circumstances prove the essential material element of "actual possession" proving the defendant had the firearm on or about his person or under his control "at some point" during the commission of the underlying offenses,

pursuant to *State v. English* 2010-Ohio-1759 *Id.* at ¶28 the state has an obligation to hold clearly that the firearm specification 2941.144 element essential and material in the jury charge need call for proof of a closer connection between the offender and the gun "at some point" during the commission of the substantive offense. In *State v. English* 2010-Ohio-1759 *Id.* at [*p1] fingerprints found on the shotgun found in the kitchen showed *English* handled the firearm and showed actual possession "at some point". The said essential elements call for Const. XIV sufficiency of proof of a closer connection between the offender and the firearm "at some point" during the commission of the substantive offense. Struckman's case is very distinguishable because in Struckman's case the essential material element to sufficiently prove actual possession is "not possible" because the states witness officer jones clearly testified "this weapon we do not" "I do not personally believe it to be used in the offence" see attachment G at T.p.672. Furthermore, the state prosecutor knew the suppression hearing transcripts attachment A-4 shows states witness officer sublet (officer who wrote the warrant) state that the M-10 dangerous ordnance had no reasoning for the origin of the search warrant. The state witness officer jones testimony and officer sublets testimony in the record establishes that the state prosecutor acted knowingly in misrepresenting that Const. XIV sufficiency requiring to prove the essential elements in the firearm specification was not necessary, see attachment G at T.p.1251, 1261-1262. Applying the scienter element, while the "outcome of the determination of the allegations hinged on the scienter prong", the state prosecution failed to put forward well-pleaded allegations that Struckman acted with scienter, Struckmans argument with other testimonial facts are utilized to prove Struckman is innocent of the required scienter prong of the possession of dangerous ordnance firearm specification charge 2941.144. There is

not adequate proxy for the explication of the scienter requirement. The state trial court should not have instructed the jury on a charge that is not supported by evidence citing *Rodriguez v. McMullen,* 2023 U.S. App. Lexis 8643 at HN3. The state trial court allowed an "unreliable vehicle for determining guilt or innocence" pursuant to *State v. Colston* 2020-Ohio-3879 at HN12. From the nature of a courts task in evaluating a sufficiency-of-the-evidence challenge, essentially addresses whether "the government case was so lacking that it should not have even been submitted to the jury" pursuant to *Burks v. United States* 437 U.S. 1,16,98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The state's case against Struckman collectively rests entirely on circumstantial evidence therefore "is not one of reasonable doubt which is for the jury to determine, but one of evidentiary Const. XIV sufficiency which is for the trial court jury to determine," this is and always has been, a rule relating to evidentiary sufficiency. If the state's case is based solely on a single strand of circumstantial evidence and that evidence does not exclude every reasonable hypothesis of innocence, neither the state trial court judge nor a state trial court jury can lawfully return a verdict of guilty (Bold emphasis added). Trial transcripts clearly prove states witness officer jones testimony shows there was nothing for the 2018 state trial court jury to decide concerning firearm specifications 2941.144 and upon Struckmans rule 29 motion on 4-27, 2018 at T.p. 16-24, the judge was duty bound, as a matter of law, to enter a judgment of acquittal pursuant to *Holland v. United States*, 348 U.S. 121. The state trial courts "review of the merits" at trial was "cursory", and not complete or "concrete". Furthermore, the state courts have never applied its contemporaneous objection rule, therefore pursuant to *Wainwright v. Sykes* 433 U.S. 72, 87-88 cannot bar federal review of constitutional plain trial error pursuant to *Hockenbury v. Sowders* 633 F.2d 443, 444, **7, thus this Federal court is not precluded from

reviewing the said error in a habeas corpus proceeding under *Cook v. Bordenkircher,* 602 F.2d 117 *Id.* at 119. The state was liable to resolve issues of credibility of their own state witness, and because the state witness officer jones created conflict with the states required material element of actual possession in his testimony in stating that "this weapon we do not" "I do not personally believe it to be used in the offence" see attachment G at T.p.672, the state trial court should have provided the jury with more analytical assistance to use in clearly evaluating the testimonial evidence presented. Clearly, the 2941.144 firearm specifications conviction is not Constitutionally sound because the state has not sufficiently proved every element of the 2941.144 specification beyond a reasonable doubt pursuant to *In re Winship* 1970 U.S. Lexis 56, 397 U.S. 358 at 364. Furthermore, the 2018 trial court jury had failed to give full conscientious or impartial consideration to states witness officer jones said testimonial evidence or acknowledge or comprehend trial "exhibit PG", Struckman has a U.S. Const. V, XIV due process right that "the verdict should be the result of sound judgment, dispassionate consideration and conscientious reflection" pursuant to *Val Decker packing Co. v. Treon* 88 Ohio App. 479, 489, 58 Ohio law Abs 545, 97 N.E. 2d 696 (1950). There is evidence that the 2018 trial court jury made a grave due process mistake over an important legal issue that they did not clearly or concisely comprehend in "exhibit PG" and in the original 2018 jury instructions. "Conveniently accessible" and "within immediate physical reach" is defined in *State v. Castle*, 2016-Ohio-4974 at 22,23. In Struckmans case "Immediate physical reach" * obviously satisfies neither criteria of this definition" in equivalence to *State v. Smith* 2010-Ohio-4006 at HN4. The states witness officer jones testimony "clarifies the relevant fact" that there is no evidence what so ever to prove that Struckman had the dangerous ordnances "on or about his person or

under his control" while committing the alleged underlying offense primarily because the said underlying offense was a finding of not guilty making Struckmans case equivalent to *State v. Dorsey*, 2010-Ohio-6152 at [*p17]. Furthermore, the state prosecutor has knowingly misled the jury with deceptive practices while knowing Struckman did not have dominion or control over the area and knowing there is no fingerprints or DNA proof of the essential material elements of a closer connection to show Struckman had ever actually possessed the dangerous ordnances "at some point" to fairly speculate the constructive possession element in sufficiently proving the firearm specification. It is clear the dangerous ordnances were never sufficiently proven to be handled or used in order to sufficiently prove or show proof beyond a reasonable doubt with the required essential actual possession element "at some point", the state has collectively failed to satisfy the Const. Amend. XIV sufficiency proof requirements for the application of firearm specification in R.C. 2941.144. Furthermore, the state prosecutor used deceptive practices to deceive the 2018 jury by using multiple possession theories to confuse and mislead the jury in deliberating the essential material elements in the dangerous ordnance specification charges 2941.144, it is evident the state prosecutor made a misstatement of law by alleging "we believe the gun was being used with the suppressor", and stating "we do not have to prove that – at all that he touched this evidence or that he held the evidence", see attachment G at T.p.1262. The state prosecutor mischaracterization was "improper" pursuant to *Marshall v. Hendricks*, 307 F.3d 36, at HN13. Furthermore, the state prosecutor statement at the 2018 trial "we don't have to prove" was an improper misstatement of law pursuant to *United States v. Voice*, 622 F.3d 870, at HN5. State prosecutor may not "misstate the facts or law" or "assume prejudicial facts not in evidence" pursuant to *Lucas v. Georgia Diagnostic and Classification*, 771 F.3d 785, 804 (2014). Furthermore, the state prosecutor's knowing failure to correct conflict in states witness officer jones perjured

testimony with the omitted actual innocence facts in exhibit PG evidence violates due process citing *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct.103 (1957). The state prosecutor omitting that states witness officer jones testimony was false required reversal pursuant to *Drake v. Portuondo*,553 F.3d 230, at HN3, HN4, HN5. The aforesaid state prosecutor failure to correct government states witness officer jones testimony and subsequent attempt to bolster states witness officer jones credibility while omitting factual innocence from exhibit PG is improper and violated due process citing *Shih Wei v. Flion*, 335 F.3d 119, 127-30 2nd Cir.2009. The government "may not knowingly use states witness officer jones false testimonial evidence" or "allow it to go uncorrected when it appears" citing *Napue v. Illinois*, 360 U.S. 264 *Id.* at 269. The Federal court established the general proposition that a prosecutor's knowing and intentional use of (state's witness officer jones) false testimony while omitting factual innocence from exhibit PG and in obtaining a conviction violates the defendants due process rights, and denies a fair trial pursuant to *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1945). State prosecutor's knowing introduction of states witness officer jones false testimony and subsequent arguments relying on that testimony is improper citing *Dow v. Virga*, 729 F.3d 1041, 1050 (2003). The state prosecutor deceived the jury by omitting factual innocence from exhibit PG and using a combination of an actual possession theory along with a constructive possession theory in misleading and confusing the jury to obtain the conviction. After the 2018 conviction the state appeals court 2020 direct appeal attach. J determination overlooked exhibit PG and "unreasonably determined" the facts related to the essential Const. XIV "actual possession" sufficiency element requirement when affirming the specifications determination with "constructive possession",

> See the March 31, 2020 determination C-180287 (attachment J) {¶13} "This court has stated that in proving a specification, the state need not show that the defendant actually possessed a

> weapon, but instead may show constructive possession. See *State v. Jackson*, 1st Dist. Hamilton No. C-140178,2014-Ohio-5008, ¶ 18-19. Accord *State v. Walker*, 10th Dist. Franklin No. 14AP-905, 2016-Ohio-3185, ¶ 63-64. *** *English* at ¶ 28 quoting *State v. Harry*, 12th Dist. Butler No. CA2008-01-0013, 2008-Ohio-6380, ¶ 53.

The aforementioned cases cited by the state appeals court remained very dissimilar to Struckmans case and erred in proving the required essential Const. Amend. XIV sufficiency material element of "actual possession" "at some point" in the 2941.144 firearm specification. In reviewing the state appeals court legal citations in *State v. Jackson,* 2014-Ohio-5008 *Id.* at [*p3], [*p16] it's undisputable the apartment belong to *Jackson* and gunshot residue was positive on the bed, furthermore *Jackson* gave a directive to "do something" with the gun and *Jackson* discussed the gun showing *Jackson* gave admission to being conscious of the gun. *Jackson* case shows constructive possession from admission to being conscious of the gun along with actual possession from a directive to "do something" with the gun in proving a specification and conscious. In *State v. Walker,* 2016-Ohio-3185 *Id.* at [*p6], [*p8] *Walker* verified his apartment number while also giving admission to his conscious of a gun in the "tall gun safe", about four, five feet tall inside the closet. *Walker* opened the gun safe for the police. The *Walker* case shows actual possession in proving a specification and conscious. See *State v. English* 2010-Ohio-1759 *Id.* at ¶ 28 whereas actual possession is required "at some point" during the commission of the crime. *State v. English* 2010-Ohio-1759 *Id.* at ¶ 29 "revolver in plain view" ** "*English* fingerprint on it". *English's* fingerprint shows actual possession "at some point" in proving constructive possession to support specifications and conscious. In *State v. Harry* 2008-Ohio-6380 *Id.* at [*p2] shows confidential informants involved, surveillance, anonymous complaints, *State v. Harry*

2008-Ohio-6380 *Id.* at [*p54] weapons were located in basement where *Harry* was found, *State v. Harry* 2008-Ohio-6380 *Id.* at [*p54] fingerprint was on the magazine which went to the gun. *Harry's* fingerprint shows actual possession "at some point" in sufficiently proving constructive possession specifications and conscious. The aforementioned cases are distinguishable to Struckman's because at the 2018 trial Struckman proved: the house did not belong to Struckman, there was no gunshot residue on Struckman or DNA from Struckman, Struckman was never proven to be conscious of the small locked carrier safe, Struckman was never proven to be conscious of the dangerous ordnance contained therein, Struckman was never proven to have had ability to access or unlock the locked safe, Struckman never had exclusive access to the house or premises, Struckman was never proven having placed the items in the safe or placed the safe in the closet. Struckman was only at the home to do repairs, see attachment G at T.p.525, 645, "looked like someone had started to remodel and had done some demolition work, "the whole first floor was demolished, unlivable". Struckman was never proven to be seen upstairs of the house in question where the dangerous ordnances were found. Most importantly no one has ever saw Struckman with the M-10 dangerous ordnances, furthermore , attachment G at T.p.672, shows state witness officer jones testified "I don't believe it to be used in the offense" which proves in the record that the state cannot sufficiently prove the essential material element of actual possession "at some point" to have a valid claim the M-10 dangerous ordnance was or had ever been used or was being used with the dangerous ordnance suppressor therefore according to Const. Amend. XIV sufficiency the firearm specification R.C.2941.144 which requires actual possession "cannot apply". Irrespective of the state appeals courts unreasonable constructive possession determination that speculated Struckman

allegedly would have been conscious of the small locked carrier safe or the items inside the small locked safe being dangerous, additional prejudice arose when the state misrepresented in their determination attach. J that Struckman was the only person who had dominion and control over the area. The said "unreasonable determination" did not assure sufficient proof as required by Const. Amend. XIV essential material element to prove beyond a reasonable doubt that the dangerous ordnance M-10 gun was used with the dangerous ordnance suppressor to support specifications, citing *United States v. Murphy*, 1993 U.S. App. Lexis 1753 at HN7, [*15}, and [*17] whereas "the government must show some relation between the "use" of the firearm and the underlying ** crime. *Murphy* is very comparable to Struckman because the states case against Struckman is even weaker than the government's case against *Murphy* as in Struckman's case the dangerous ordnances was ** in a small personal sized "locked safe" and the Mac 10 was not accessible to Struckman. Comparable as in Struckman's case the government failed to show that the dangerous ordnances (M-10) was accessible or was "an integral part of the predicate offense and facilitated the commission of that offense", Furthermore see attach. B at *p32,*p34 "the affidavit falsely stated that Struckman fired rounds" because at trial "the state stipulated "no gunshot residue" "results negative with regard to Struckman. Thus, it is not reasonable for the state to stack inferences from uncertain speculation misleading the jury to presume guilt while omitting factual innocence from state witness officer jones testimonial evidence stating that "this weapon we do not" "I do not personally believe it to be used in the offence" see attach. G at T.p.672. The said testimony proves in fact Struckman never had dangerous ordnances under his control while committing offenses also primarily because the alleged underlying offenses of inducing panic/menacing C/15/CRB/9541 was dismissed and possession of marijuana C/15/CRB/10112, attach. A-5, "exhibit PG", submitted at the 2018 trial shows actual innocence was litigated prior and acquitted. The states mischaracterization of the circumstances speculating the dangerous

ordnance was "used" substantially affected the verdict because the jury became misinformed and was confused about exhibit PG which unjustifiably prejudiced Struckman pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, *Id.* 507 U.S. at 623. A "full and fair" examination of attach. G at T.p. 88-518 by this Sixth District Court will reveal that on every level the state had ample opportunity to become familiar with the prior acquittal "exhibit PG" (attach. A-5) acquittal entry from the 2018 trial which presented ample "adequate opportunity" for the state court to notice irregularities in the 2018 trial court proceedings which were contrary to law and furthermore obligates their duty by law to review the prior municipal case pursuant to *State v. LoveJoy* 79 Ohio St. 3d 440; also pursuant to federal law duty in *Lucas v. Hamilton County Mun. Court*, 2012 U.S. Dist. Lexis 76774 at [*29-*35]. The state collectively disregarding facts, omitting facts and allowing false evidence to go uncorrected directly affected the sufficiency to convict beyond a reasonable doubt because it prevented Struckman opportunity for a fair 2018 trial. The aforementioned facts satisfy that the state is contrary to Const. Amend. V, XIV "due process" and has failed to meet Const. Amend. XIV sufficiency of evidence requirement of proof beyond a reasonable doubt of every fact necessary to constitute the crime pursuant to *Jackson v. Virginia*, 443 U.S. 307 *Id.*. The aforesaid also establishes the "substantial and injurious effect" supporting habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619, *Id.* 507 U.S. at 623.

(2) Mr. Struckman was deprived of his right to counsel under Sixth Amendment to the United States Constitution when his request for counsel during trial was denied. Embodied in the right to counsel Sixth Amendment United States Constitution is a "correlative right to dispense with a lawyer's help" pursuant to *State v. Martin*, 2004-Ohio-5471 at ¶23, quoting *Adams v. United States es rel. McCann*, 317 U.S. 269,279,63 S.Ct. 236, 87 L.Ed 268 (1943).

Struckman's argument must be understood in the context of the following irregularities in the 2018 proceedings, furthermore Struckman's argument must also be understood in the context of Friday, April 27, 2018 whereas state court appointed standby counsel took over as "full counsel" to represent Struckman, as Struckman had been told by the state trial court he could do attachment G at T.p.165, 1006. On Friday, April 27, 2018 the state trial court granted Struckman's independent constitutional right to representation; the state trial court released the jury, went off record, and Struckman was released from the courtroom. The state trial court then infringed by way of Struckman's right to counsel and fair trial pursuant to Const. Amend. V, VI by the state courts appointment interference with Struckmans "full counsel" at that critical stage in the proceedings when the state trial court held an "off record" hearing which resulted in an "off record" arrangement between Struckmans "full counsel" and the state trial court whereas the state trial court purchased trial transcripts which affected Struckman's "full counsel's" strategy. Struckman was deprived the Const. V right to a fair trial, and the right to fair trial was infringed upon because Struckman was certainly deprived his fundamental right to be intelligently part of the said "off record" critical stage of his 2018 criminal state trial court proceedings in the said off record hearing and arrangement between state court appointed counsel and the state trial court in purchasing the "off record" transcripts. The said occurrence also deprived Struckman by excluding him from understanding and planning with state court appointed counsel's strategy. Struckman was denied the opportunity by the state trial court and by his state court appointed counsel to competently understand the infringement on his Const. V right in violation that had taken place in that said "off record" critical stage in the proceedings. Looking at attachment G at T.p.1000,1001 the 2018 state trial court record makes

it apparent that on Friday, April 27, 2018 Mr. Newburger took over as "full counsel," then apparently "off record" state court appointed counsel negotiated a deal Friday to purchase "off record" transcripts, and then afterwards "at some point" "off record" on that Friday one way or another advised the state trial court or was advised by the state trial court he was "not able to do so" indicating and meaning that he was incompetent to take over the defense. The said state trial court record shows that on Friday April 27, 2018 Struckman was deprived a sufficient examination, or a meaningful discussion in compliance with Crim.R.44 because by Monday April 30, 2018 attachment G at T.p.1004 the state trial court responds "on record" as though Struckmans "full counsel" had never taken over the defense and responds "on record" as though the Friday exchange between Struckmans "full counsel" and the state trial court was so short-lived that the state trial court still considered Struckman *pro se* as of that said Friday April 27, 2018, "as if" Struckman's state court appointed "full counsel" and the state trial court had not ever had that said "off record" exchange. It is apparent by the record that the state trial courts deliberate intentions are in demonstration in the Monday April 30, 2018 record attachment G at T.p.1004, because by that said time on Monday the state trial court had already deprived and infringed on Struckman's U.S. Const. V,VI, XIV rights by being non-compliant to the Crim.R.44 waiver, by that time Struckmans right to fair trial had already been affected by Friday April 27, 2018 because the state trial court had already deprived Struckmans correlative right to dispense with his state court appointed "full counsel" before the "off record" exchange between "full counsel" and the state trial court occurred on Friday April 27 and before the state trial court sent the "off record" email Saturday April 28, 2018 to Struckman's state court appointed "full counsel". The 2018 state trial court has committed

appointment of counsel interference without Struckman's permission or consent. Furthermore, the defenses state court appointed assistance of appellate counsel was deprived of the right to use the evidence in the direct appeal because the 2018 state trial courts "off record" email and transcript exchange between state court appointed "full counsel" and the state trial court was outside of the record, the said state trial court actions obstructed a complete 2018 trial record on direct appeal, citing *State v. Leyh* 166 Ohio St. 3d 365 *Id.*. The state appeal court detailed in a subsequent post-conviction determination appeal C-200069 about the said "off record email" and in doing so placed the following leading facts into the appeal record.

> see (attachment B) case C-200069 *State v. Struckman* 2021-Ohio-1043 at {¶39} "the hearing on his midtrial request for counsel," *** "concluded that Struckman had not been denied his constitutional right * "because he had, in fact, chosen self-representation". Struckman, 1st Dist. Hamilton No. C-180287, 2020-Ohio-1232 at ¶ 21-38.
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> *State v. Struckman* 2021-Ohio-1043 at {¶40} whereas the court states "Struckman alleged that the trial court, in refusing his midtrial request for appointment of counsel" *** "the outside evidence offered *** consisting of the trial courts email ***, outlining the procedure for addressing the request that "full counsel" take over the defense, essentially confirmed what this court in the direct appeal determined that the record showed: that the trial court had been committed to complying with the waiver requirement", *** and because the email was merely cumulative of evidence of record it's submission did not preclude the common pleas court from applying the doctrine of res judicata.

The transcript evidence attachment G at T.p.999-1001 shows the state appeals court determination attachment J at ¶21 stating "when his counsel during trial was denied" misrepresents the fact about Struckman being granted state court appointed counsel, in fact the state trial court did not deny Struckman's midtrial request for counsel it granted it. Therefore, the state appeal court's determination in attachment J at ¶21, C-180287, *State v. Struckman* 2020 Ohio app. Lexis 1187 is an "unreasonable determination of the facts" pursuant to *Badelle v. Correll*, 452 F.3d 648, 654-655 because the state appeal court failed to "identify the relevant facts" relevant to counsel being granted and counsel being ineffective in the state appeal C-180287 determination, First the fact that the initial hearing was in fact on Friday, April 27, 2018 whereas "full counsel" was granted, and Second the fact that attachment B at {¶39}, {¶40} in state appeal C-200069 *State v. Struckman* 2021-Ohio-1043 *Id.* shows how the state appeal court determination misrepresented the relevant fact in the state appeal C-180287 record about all the surrounding details that transpired at that said point Friday, 4-27-18 with the state trial court under the seal of ohio and the determination never gave considerable review or revealed the irregularities in the state trial court proceedings which deprived Const. VI right to counsel when Struckman became "off record" and left the room from the state trial court proceedings. When in fact through reflection of the evidence on record it can now be collectively proven "at that said point" when Struckman was gone from the trial court room on Friday, 4- 27- 2018 became the state trial courts "collaborated" resolution to deprive Const. VI and "take away" Struckman's state court appointed "full counsel" that the state trial court had already granted. The evidence both off and on the record together proves that after the state trial court granted counsel it then moved "off record", dismissed Struckman from the room and